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USOECD

FOLLOWING REPEAT USUN 01117 ACTION SECSTATE MARCH 28.

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ALOECD

E.O. 11652: N/A
TAGS: EGEN, ECCSOC, EINV
SUBJECT: MARCH 23-24 IGWG SESSION ON CODE OF CONDUCT
RELATING TO TRANSNATIONAL CORPORATIONS (TNC'S)

REF: USUN 1100

1. LAST DAY AND A HALF OF FIRST WEEK OF SESSION WAS
DEVOTED TO GROUP DISCUSSION OF SECTION IV(B) OF CHAIR-
MAN'S ANNOTATED OUTLINE (NATIONALIZATION AND COMPEN-
SATION) AND QUICK REVIEW OF SEC. IV(C) (JURISDICTION).
HIGHLIGHTS FOLLOW.

2. NATIONALIZATION AND COMPENSATION: CHAIRMAN
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PAGE 02 STATE 081835

(NIKlasson) MADE PLEA TO AVOID REPEATING RIGID LINES
OF PAST DISPUTES ON THIS SUBJECT IN SEARCH FOR NEW,
COMPROMISE LANGUAGE. PRINCIPAL G-77 INTERVENTIONS
(MEXICO-SEPULVEDA; NIGERIA-ABOUAH; AND INDIA-BHATT)
NEVERTHELESS ADHERED TO USUAL THEME OF ABSENCE OF AGREED
INTERNATIONAL LAW IN THE INVESTMENT AREA, AND OUTDATED
NATURE OF TRADITIONAL FORMULATION OF PROMPT, ADEQUATE

AND EFFECTIVE COMPENSATION. WHILE STRESSING THE ESSENTIAL CALVO VIEW THAT INVESTMENT DISPUTES MUST BE GOVERNED BY MUNICIPAL LAW BEFORE LOCAL COURTS, HOWEVER, THESE INTERVENTIONS DID STRIKE CONCILIATORY TONE AND OFFERED SOME POSITIVE ELEMENTS.

3. FOR EXAMPLE, THE RIGHT OF NATIONALIZATION IN THE PUBLIC INTEREST OR FOR NATIONAL SECURITY WAS EMPHASIZED BY THESE SPEAKERS AS COMMON ELEMENT BETWEEN G-77 AND OECD COUNTRY VIEW, AS WELL AS DUTY TO PROVIDE JUST OR ADEQUATE COMMENSATION. ARBITRATION OR OTHER THIRD PARTY SETTLEMENT PROCEDURES SHOULD BE OPEN IF THE HOST STATE FREELY AGREES TO SUCH PROCEDURES. DUE PROCESS AND NON-DISCRIMINATION WERE MENTIONED IN CONNECTION WITH EQUALITY OF HOST STATE-INCORPORATED THE SUBSIDIARIES AND NATIONALS OF THE STATE UNDER LOCAL LAW; IT WAS ASSERTED THAT DEVELOPING COUNTRY LEGAL SYSTEMS AFFORDED THE'S AMPLE PROTECTION. NIGERIAN DELEGATE ACKNOWLEDGED AND IMPLIED ACCEPTANCE OF HOME GOVERNMENT DIPLOMATIC REPRESENTATIONS ON BEHALF OF THE'S. HE ALSO EMPHASIZED TWO-WAY ASPECTS OF SOVEREIGNTY AND ECONOMIC INTERDEPENDENCE ("NO COUNTRY IS AN ISLAND"), AND THE IMPORTANCE OF A CLIMATE OF MUTUAL TRUST AND CONFIDENCE, NOTING THAT OECD GUIDELINES DID NOT SEE THE NEED TO ADDRESS NATIONALIZATION/COMPENSATION ISSUES AT ALL. USSR, GDR AND MORE FORTHCOMING ROMANIAN STATEMENTS LIMITED OFFICIAL USE

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PAGE 03 STATE 081835

GENERALLY REFLECTED G-77 THEMES.

4. IT WAS CLEAR, HOWEVER, THAT G-77 ARE DIVIDED ON A NUMBER OF IMPORTANT POINTS. VENEZUELAN AND PERUVIAN DELEGATES PARTED COMPANY WITH MEXICAN, AND STOOD BY ANDEAN PACT VIEWS ON ARBITRATION; LATTER DELEGATE IN RESPONSE TO US DELEGATE COMMENT ASSERTED THAT RECENT PIPELINE FINANCING ARRANGED BY PERU WITH JAPANESE INTERESTS, PROVIDING FOR ARBITRATION UNDER UK LAW, WAS FULLY CONSISTENT WITH PERU CONSTITUTION AND ANDEAN CODE. PANAMANIAN DELEGATE IN EXTENSIVE REMARKS TOOK LEAD IN ARTICULATING CALVO POSITION, REplete WITH HISTORICAL REFERENCES TO ARMED INTERVENTION IN LATIN AMERICA IN NATIONALIZATION CASES. HE EVEN TOOK ISSUE WITH SECRETARIAT ANNOTATION'S INCLUSION OF UNGA RES. 1803, AND NOTED THAT MORE CONTEMPORARY RESOLUTIONS, SINGLING OUT RES. 3171 (17 DECEMBER, 1973) IN PARTICULAR, CONTAINED NO ACKNOWLEDGEMENT OF ANY INTERNATIONAL LAW IN THIS AREA.

5. OECD COUNTRIES, LED BY USDELE, EMPHASIZED CRITICAL AND FUNDAMENTAL IMPORTANCE OF SECTION AND ATTEMPTED TO

PICK UP ON POSITIVE THEME OF MAIN G-77 REMARKS. INTERVENTIONS RESTATED AND CLARIFIED MEANING OF "PROMPT, ADEQUATE AND EFFECTIVE" FORMULA, UTILIZING CIEC G-8 TEXT AND LANGUAGE OF 1967 DRAFT OECD CONVENTION ON PROTECTION OF FOREIGN PROPERTY. USDEL AND OTHERS INSISTED TRADITIONAL FORMULA BE REFLECTED IN TEXT OF EXPANDED ANNOTATION, AS WELL AS ANY NEW LANGUAGE OF CHAIRMAN. OECD DELS ALSO EMPHASIZED MUTUALITY ARISING FROM NATURE OF SOVEREIGNTY IN INTERDEPENDENT WORLD ECONOMY, AND COMPATIBILITY WITH SOVEREIGNTY OF STRUCTURE OF INTERNATIONAL LAW AND FREE ACCEPTANCE OF LIMITATIONS ON SOVEREIGNTY SUCH AS THIRD-PARTY ARBITRATION PROCEDURES AND BILATERAL INVESTMENT PROTECTION AGREEMENTS. LINKAGES WERE MADE TO SECTIONS LIMITED OFFICIAL USE

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PAGE 04 STATE 081835

IV(A) AND IV(C) OF THE OUTLINE. UKDEL PICKED UP ON ABOUAH REMARK TO UNDERLINE ROLE OF HOME GOVERNMENT REPRESENTATION AND PROTECTION IF LOCAL REMEDIES EXHAUSTED OR INEFFECTIVE, AND NETHERLANDS DEL PLACED EMPHASIS ON DISPUTE SETTLEMENT REQUIREMENTS OF ARTICLES 2 AND 33 OF UN CHARTER AND ENCOURAGEMENT OF STIPULATIONS REGARDING DISPUTE SETTLEMENT IN INVESTMENT CONTRACTS. USDEL POINTED OUT THAT ISSUES OF SECTION IV(B) WENT BEYOND TNE'S AND PRIVATE INTERESTS. MUTUAL INTEREST OF GROUP MEMBERS IN RECOGNIZING ROLE OF INTERNATIONAL LAW WAS STRESSED. IN RESPONSE TO PANAMANIAN, USDEL NOTED THAT CALVO DOCTRINE WAS PRODUCT OF AN ERA NOW OVERTAKEN BY EFFORTS TO CONSTRUCT AN ADEQUATE INTERNATIONAL LEGAL FRAMEWORK TO PROMOTE AMICABLE ADJUSTMENT AND SETTLEMENT OF DISPUTES. FRG DEL BLUNTLY NOTED THAT FAILURE TO AGREE ON SECTION IV(B) WOULD DEFEAT CODE EXERCISE, AND IN RESPONSE TO ABOUAH'S OPTIMISM THAT GAPS BETWEEN G-77 AND DEVELOPED COUNTRY POSITIONS WERE "ARTIFICIAL", INVITED G-77 TO SIMPLY MOVE TO AGREEMENT ON G-8 CIEC TEXT.

6. AS EXPECTED, NIKLASSON HAD DEVELOPED INFORMAL "COMPROMISE" FORMULA, WHICH HE PRESENTED TO GROUP AT CONCLUSION OF DISCUSSION. HIS SUMMARY NOTED PATTERN OF RESOLUTION OF DISPUTES IN THIS AREA REGARDLESS OF DOCTRINAL DIFFERENCES, OUT OF ECONOMIC SELF-INTEREST AKIN TO RELUCTANCE OF MOST DEBTOR STATES TO DEFAULT, AND CONSIGNED THE ORIGIN OF DISPUTE OVER ISSUES OF THIS SECTION TO OLD CASES OF NATURAL RESOURCE SECTOR INVESTMENTS, NOW LONG SINCE "RESOLVED". TEXT OF NIKLASSON SUGGESTION IS PICKED UP IN NEW SECRETARIAT ANNOTATIONS LDC'D TO DEPT (WORKING PAPER NO. 1/ADD. 4, PARAGRAPH 179).

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PAGE 05 STATE 081835

7. JURISDICTION: COMPRESSED DISCUSSION OF SECTION IV(C) IN LAST TWO HOURS OF FRIDAY MEETING REVEALED CONSIDERABLE CONFUSION OVER ISSUES BEING COVERED. TO SOME EXTENT, VIEWS WERE A REHASH OF POSITIONS ON ROLES OF MUNICIPAL AND INTERNATIONAL LAW IN THE INVESTMENT AREA. GROUP, HOWEVER, AGREED THAT BROADER ISSUES OF JURISDICTION WERE INVOLVED.

8. PRINCIPAL ELEMENTS FOR DISCUSSION WERE JURISDICTION OF STATES BASED ON TERRITORIAL AND NATIONALITY PRINCIPLES (USDEL NOTED "EFFECTS" DOCTRINE AS WELL), AND NEED FOR INTERGOVERNMENTAL CONSULTATION AND COOPERATION TO RESOLVE INEVITABLE CONFLICTING REGULATION OF TNE'S. G-77 INTERVENTIONS STRESSED CONCERN ABOUT EXTRA-TERRITORIALITY OF HOME GOVERNMENT REGULATION (NIKlasson HIMSELF POINTED OUT THIS COULD BE TWO-WAY STREET SHARED BY HOST GOVERNMENT REGULATION), AND THE USE OF TNE'S AS "CONVEYOR BELTS" FOR LAWS AND FOREIGN POLICIES OF OTHER JURISDICTIONS. NIKlasson SEEMS INTERESTED IN NOTING NEED FOR MULTILATERAL AGREEMENT ON RULES FOR RESOLVING CONFLICTS OF JURISDICTION.

9. WITH RESPECT TO DISPUTE SETTLEMENTS BETWEEN STATES, VIEWS ON ARBITRATION AND THIRD-PARTY SETTLEMENT PROCEDURES TRACKED WITH DISCUSSION OF PREVIOUS SECTION. REGARDING DISPUTES BETWEEN TNE'S AND HOST GOVERNMENTS, USDEL TOOK LEAD IN HIGHLIGHTING FOUR ELEMENTS CODE SHOULD REFLECT: (1) ENCOURAGEMENT AND RESPECT OF CONTRACTUAL DISPUTE-SETTLEMENT PROVISIONS, AND RECOGNITION OF RIGHT OF PARTIES TO SELECT GOVERNING LAW AND FORUM, INCLUDING INTERNATIONAL ARBITRATION; (2) EXHAUSTION OF LOCAL OR CONTRACTUAL REMEDIES AS CONDITION PRECEDENT TO INTERGOVERNMENTAL CLAIMS; (3) RECOGNITION OF ROLE OF HOME GOVERNMENT DIPLOMATIC FACILITATIVE ASSISTANCE AND REPRESENTATION IN THE AVOID-

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PAGE 06 STATE 081835

ANCE AND RESOLUTION OF DISPUTES AND RIGHT TO ASSERT CLAIMS; AND (4) RECOGNITION OF ROLE OF BILATERAL INVESTMENT PROTECTION, GUARANTY AND FCN AGREEMENTS.

10. NIKlasson FOCUSED CONSIDERABLE DISCUSSION ON RIGHT OF PARTIES TO AN AGREEMENT TO "CONTRACT OUT" OF LOCAL LAW, WITH US AND CANADIAN INTERVENTIONS,

AND NIGERIAN ON G-77 SIDE, GIVING POSITIVE VIEWS
CONSISTENT WITH PUBLIC POLICY, CONVENIENCE OF FORUM,
AND SIMILAR QUALIFICATIONS; MEXICAN AND INDIAN DELS
SUGGESTED THIS WOULD NOT BE POSSIBLE UNDER THEIR LAWS.
COMMENTS ON ROLE OF ARBITRATION FOLLOWED NOW ESTABLISHED
PATTERN, ALTHOUGH NIKLASSON INTRODUCED DISTINCTION
BASED ON WHETHER HOST GOVERNMENT-TNE AGREEMENT TO AR-
BITRATE PRE- OR POSTDATES DISPUTES. IN FORMER CASE,
NIKLASSON SUGGESTS THAT GOVERNMENT MAY NOT BE BOUND
IF, "WITH DUE REGARD TO RELEVANT CIRCUMSTANCES A STATE'S
SOVEREIGN RIGHTS AND INTERESTS ARE INVOLVED". WE INTEND
TO LINK THIS TO BRAODER ISSUE OF GOVERNMENT OBSERVANCE
OF CONTRACTS WITH INVESTORS, AND WILL UTILIZE AS APPRO-
PRIATE RECENT LANGUAGE RESPONDING TO GAO REPORT ON
PETROLEUM VULNERABILITY ON THIS POINT. LEONARD
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